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1201 NEW YORK AVENUE, N.W.
WASHINGTON, D.C. 20005-3919
(202) 789-3400
FAX (202) 789-1158

KECK, MAHIN & CATE

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

July 7, 1994

By Hand

William F. Caton
Secretary
Federal Communications Commission
Room 6008
2025 M Street, N.W.
Washington, D.C. 20554

EX PARTE PRESENTATION

Re: In the Matter of the Petition of the Inmate
Calling Services Providers Task Force for
Declaratory Ruling; RM 8181

Dear Mr. Caton:

The Inmate Calling Services Providers Task Force's ("ICSPTF") hereby responds to two recent ex parte communications made to the Commission's staff in this proceeding, one by Pacific Bell on May 9, 1994, the other by BellSouth on May 31, 1994.

Pacific Bell and BellSouth have raised an artificial concern about having the Commission avoid "piecemeal" policy determinations in connection with ICSPTF's petition. As discussed below, ICSPTF has not asked the Commission to address, directly or indirectly, the Commission's customer premises equipment ("CPE") policies for public payphones as most notably explained in Tonka Tools.¹ Nor has ICSPTF requested that the Commission change or alter existing rules or policies, or otherwise create new rules or policies where none have been before. ICSPTF's petition merely requests a clarification on how the Commission's current CPE rules apply to inmate calling systems, not public payphones. Inmate calling

¹ Tonka Tools, Inc. and Southern Merchandise Corp., 58 RR 2d 903 (1985).

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systems and their controlling processors are placed on customers' premises and have all the functionality of the PBXs that comprise *private systems*, not public payphones. The attempt by Pacific Bell and BellSouth to frame the issue presented by ICSPTF's petition as one that will require a modification of the Commission's CPE policies for public payphones is simply wrong.

Indeed, the most telling point about these recent filings is that it now appears that the Regional Bell Operating Company's ("RBOCs") are no longer arguing that their specialized inmate calling systems are not, in fact, customer premises equipment ("CPE") pursuant to Computer II and its progeny. Any RBOC that still maintains this defense clearly does so as a legal formality. Clearly, it is difficult to deny that inmate calling systems are, in fact, *private systems*, just like the private systems at non-inmate institutions, and that the Commission's limited CPE exclusion for payphones available to the transient, mobile public, therefore, does not apply.

What the RBOCs are now requesting is that the Commission deny, or indefinitely delay the grant of, ICSPTF's petition on policy grounds, thereby providing them a *de facto* waiver of the Commission's CPE policies for inmate calling systems. While the RBOCs may raise some interesting, although unpersuasive, policy considerations in support of their contention that inmate calling systems should be exempt from the CPE requirements, those *policy considerations* are not at issue here. ICSPTF's petition is a cut-and-dried request for a declaratory ruling that inmate calling systems are CPE under the Commission's current rules and pronouncements. Nothing more, nothing less. ICSPTF is not asking the Commission to adopt new rules or policies. It is merely requesting a declaration that inmate calling systems are CPE within existing rules.

If the Commission believes the RBOCs have raised any substantive policy issues as to why the CPE requirements should not apply to inmate calling systems that warrant further consideration, it must address those issues in the context of specific CPE waiver requests, or perhaps a rulemaking proceeding, after the grant of ICSPTF's petition. The Commission cannot address the RBOCs' requests for a modification or exemption of existing policy within the confines of ICSPTF's petition. See, American Network, Inc., 65 RR 2d 1519 (1989); BellSouth Petition for Declaratory Ruling, 69 RR 2d 572 (1991).

Despite the procedural problems associated with the RBOCs' new approach, however, the policy considerations the RBOCs now raise are inherently defective, rife with contradictions, and in

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no way deserving of a blanket CPE waiver. The most glaring of these contradictions can be seen in Pacific Bell's letter. On the one hand, Pacific Bell claims there is a level "competitive playing field" for both RBOC and independent inmate calling systems, and that Pacific Bell does not "cross-subsidize its payphone operations," which Pacific Bell presumably intends to mean private inmate calling systems. Pacific Bell Letter at 2. On the other hand, Pacific Bell claims that a declaration by the Commission that inmate calling systems are CPE "will tilt the playing field in favor of" independent providers and deprive the RBOCs of cost recovery because the MFJ restricts RBOCs from the interLATA market, whereas independent providers are not subject to that restriction. *Id.* But the MFJ prohibits Pacific Bell and the other RBOCs *right now* from providing interLATA traffic, regardless of whether the Commission grants or denies ICSPTF's petition and regardless of the regulatory status of RBOC inmate calling systems.² If the market is currently competitive, therefore, as Pacific Bell claims, and if the grant of ICSPTF's petition would otherwise place Pacific Bell at a competitive disadvantage and deprive it of cost recovery, Pacific Bell (and presumably the other RBOCs) *must* currently be cross-subsidizing their inmate calling systems by recovering their costs for inmate calling systems from other regulated accounts. There is simply no other way to reconcile these statements.

Thus, contrary to the approach taken by Pacific Bell, BellSouth clearly admits that it cross-subsidizes its inmate calling systems, and that it must maintain its ability to cross-subsidize those systems in order to compete. BellSouth's letter states that "deregulation of BOC inmate services should not be mandated until cost recovery issues are resolved to ensure a level playing field," and that "no cost recovery mechanism exists to offset equipment expense currently recovered through federal access charges." BellSouth Letter at 2. Again, rather than address the issue presented by ICSPTF's petition directly, BellSouth improperly requests an exemption of the Commission's CPE requirements for inmate calling systems on policy grounds.

In any event, Pacific Bell's bald statement that it does not cross-subsidize its inmate calling systems, even if true, does not justify a blanket waiver of the CPE requirements. Indeed, the primary purpose of the Commission's CPE policies is to prevent the

² Pacific Bell appears to believe that ICSPTF has argued that there is prejudice to independently provided inmate calling system providers from Part 68 of the Commission rules. To the contrary, ICSPTF has argued that Part 68 is irrelevant to the regulatory status of inmate calling systems.

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RBOCs and other LECs from having "opportunities to engage in cross-subsidization" to the detriment of ratepayers and competitors.³ Whether or not a LEC is actually cross-subsidizing is irrelevant to the policies underlying the Commission's CPE decisions. Moreover, to the extent such claims are relevant to CPE waiver determinations at all, there must be a detailed showing of why the public will suffer if the RBOCs or other LECs cease offering the service -- a showing that cannot be made given the RBOCs' admission that the market for inmate calling systems is already competitive. In any event, a LEC's denial of cross-subsidization is irrelevant to an underlying determination that particular equipment is CPE.

In sum, the RBOCs have raised issues that having nothing to do with the underlying question presented by ICSPTF's petition. The Commission should not be distracted by the RBOC's diversionary tactics, and should grant ICSPTF's petition without further delay.

Sincerely,



Albert H. Kramer
David B. Jeppsen

Counsel for the Inmate
Services Providers Task
Force

cc: Richard Metzger (Room 500)
Gerald Vaughn (Room 500)
Richard Welch (Room 844)
James Keegan (2025 M/Room 6010)
Ruth Milkman (Room 814)
Rudy Baca (Room 802)
Jim Coltharp (Room 844)
Olga Madruga-Forti (2025 M/Room 6008)
Suzanne Hutchings (2025 M/Room 6338-A)

³ Policy & Rules Concerning the Furnishing of Customer Premises Equipment, Enhanced Services & Cellular Communications by the Bell Operating Companies, 95 FCC2d 1117, 1129 (1983) (emphasis added).